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THE AID AND ADVICE OF COUNCIL OF MINISTERS/ POSITION OF JUDICIARY IN MAKING THE PRESIDENT A MERE RUBBER STAMP

The Authors

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The preamble of the Constitution of India declares India to be a – Sovereign, Socialist, Secular, Democratic, Republic country. The last word of the line i.e. Republic makes the President – the head of the country. But as India is being governed by the Parliamentary form of government, so the President is the head of the state and council of minister headed by prime minister are the head of the government. Article 52 to 78 of the Constitution of India deals with the Central Executive which consists of the President and the Council of Minister headed by the Prime Minister. Provisions Article 53 provides the powers of the President under which it provides that all the executive powers of the Union are to be vested in the President. Further the President can exercise these executive powers either directly or indirectly through the officers subordinate to him as provided in the Constitution.

Though Indian Constitution vests many powers, functions and responsibilities in the President but he has no function to discharge on his discretion or in his individual judgment but has to act upon in accordance to the ministerial advice Therefore the Prime Minister and Council of Ministers is the real and effective executive. Moreover according to the provisions of the Constitution under Article 74, it is clear that without the aid and advice of the Council of Ministers, President cannot exercise his powers. Article 74 provides that the President shall act in accordance with the aid and advice of the Council of Minister headed by the Prime Minister, further the proviso of the same Article provides that, after receiving such aid and advice the President may ask the Council of Minister to reconsider that advice but after that reconsideration, the President is bound to act according to that advice.

India is the country where the Separation of Powers is being followed both in the centre as well as in the states. If the concept of separation of powers is seen on a casual glance it can be said that the Indian Constitution is accepting the doctrine of separation of powers, as it has meticulously laid down the functions of various organs, namely – Legislative, Executive and Judiciary. All of these organs of the government have function in their own spheres as demarcated under the Constitution. But in its real sense, it is clear that the doctrine of separation of powers has not been accepted in its rigid sense. Though under Article 53(1) the executive powers of the Union is vested in the President but he has also wide legislative powers and also the judicial powers. Likewise the Parliament is entitled to the Legislative powers where it make laws but many of the judicial powers like – the impeachment of the President, where one house acts as the investigator and the other as the prosecutor etc. also vests in the Parliament. In the case of Judiciary, the same thing is applicable. Judiciary exercises all its judicial powers but it also interferes in all the matters of the executive and legislature. None of these organs are free from each other and are somehow interdependent on each other. Thus, the Doctrine of

Separation of Powers is not fully adopted by the Indian Constitution. Here in the case of aid and advice of Council of Ministers and the interference of judiciary in the working of executive and legislature has also made it clear that all these institutions are interdependent and by the interference of judiciary the President's powers have been limited and the scope of the aid and advice of the Council of Ministers have been widened.

Following are the powers of the President where he discharges his powers with the aid and advice of the council of ministers-

Executive powers - President is the head of the country and according to Article 53(1) all the executive powers of the Union are vested in the President and he can exercise these powers either directly or through the officers subordinate to him. Further Article 77(1) provides that all the executive powers of the Indian government shall be expressed to be taken in the name of President and he may carry out the Business of Government and the affairs of the States that may include signing of all the contracts and assurances of the property made on behalf of Government of India in his name. The ambit of executive function consists of execution of the policies, maintenance of law and order, taking the social and economic development to the new level in observance to public policy and providing the directions and supervision of foreign policy and administration of the States.

He has the power to appoint and remove the High Dignities of the State i.e. Prime Minister, Attorney General, Supreme Court Judges, etc. The appointments and removals of the persons are made by the President as the constitutional head on the aid advice of the Council of Ministers in accordance with the provisions of the constitution that is why any action by any servant of the Union in regard to the appointment or the dismissal is brought against the Union and not against the President.¹ He is to make rules for more smooth transaction of the business of Government and the allocation of the work among the ministers [Art.77(3)] but the rule of business confers the power on the ministers to carry on the administration and take decisions in their departments. The decision of any minister and the officer under Article 77(3) which is the Rules of Business is purely the decision of the President and this Article did not provide for any delegation. So, here the decision of the minister or the officer is the decision of the President.²

All these executive actions of the Union must be expressed in his name and has right to be informed of the affairs of the Union. In *S.R. Bommai v. Union of India*³, Jeevan Reddy and Agrawal, JJ have made distinction between the aid and advice under Articles 74 and 77 and also said that they are complementary to each other. "Insofar as the executive action of the government of India is concerned, it has to be taken by the Minister/Official to whom the business is allocated by the rules of business made under clause (3) of Art. 77. There is no occasion in such cases for any aid and advice being tendered to the President by the Council of Ministers. Though expressed in the name of the President they are the acts of the Government of

¹ Samsher Singh v. State of Punjab, (1974) 2 SCC 831.

² Sardari Lal v. Union of India, (1987) 4 SCC 114.

³ (1994) 3 SCC 1.

India. They are distinct from the acts of the President in exercise of his functions contemplated by Art. 74.”⁴

Although it is clear from the constitutional provisions that the executive powers of the Union vests in the President but in actual scenario it is carried on by the Ministers and the other higher officials. Therefore President’s personal satisfaction is not required and is not necessary in every case. Satisfaction of the President given in the Constitution is not his personal satisfaction but in the constitutional sense it is the satisfaction of the Council of Minister. Many landmark case and various judicial pronouncements have limited the scope of the discharge of President’s powers. How all these judicial pronouncements, have limited the scope of the executive powers of the President has been discussed as under -:

In *U.N.R. Rao v. Smt Indira Gandhi*⁵ the case of 1971, the Supreme Court held that Article 74(1) is mandatory and the President cannot exercise his powers without the aid and advice of the Council of Ministers. Further it was held that even if the Lok Sabha is dissolved, such dissolution does not require the Prime Minister and the other Ministers to resign or dismissed by the President.

In *Samsher Singh v. State of Punjab*⁶ the Supreme Court held that, “wherever the constitution requires the satisfaction of the President for the exercise by the President of any power or function, the satisfaction required by the Constitution is not the personal satisfaction of the President but the satisfaction of the President in the constitutional sense in the Cabinet system of the Government, that is the satisfaction of his Council of Ministers on whose aid and advice the President generally exercises all his powers and functions. Further the Supreme Court provided that the decision of any Minister or officer under the rules of business made under Article 77(3) is the decision of the President and this Article did not provide for any delegation.⁷ So here a little discretion is provided as the decision of the Ministers or officers under the Rules of the Business is the decision of the President.

In *Union of India v. Sripati Ranjan Biswas*⁸ the Supreme Court held that the question of the appointment or dismissal of a government servant by the President falls within the ambit of a purely executive function. In this case, it was held that “when the Constitution conclusively contemplates a constitutional President it is not permissible nor is it even intended to invest upon the President a different role of a ruling monarch. Any reference to the President under any rule under the Constitution must needs be to the President as the constitutional head, as envisaged in the Constitution acting with the aid and advice of the council of ministers.” This judgment was also based on the previous judgment of *Samsher Singh case*⁹.

⁴ *ibid.*

⁵ (1971) 2 SCC 63.

⁶ *Supra* note 1.

⁷ *Supra* note 1

⁸ (1975) 4 SCC 699.

⁹ *Supra* note 1

But on the other hand a single discretion of President which does not come under the judicial review is the appointment of the Prime Minister and the same was said by K. Ramaswamy, J. in *R. K. Jain v. Union of India*¹⁰, that, “the President while exercising the executive power under Article 73 read with Article 53, discharges such of those powers which are exclusively conferred to his individual discretion like appointing the Prime Minister under Article 75 which are not open to judicial review.” Further in this case K. Ramaswamy, J. laid down that the Council of Ministers exercises the power not as the President’s delegates but as the officers subordinate to him by constitutional mechanism envisaged under Article 77 and express in the name of the President as per Rules of Business made under Article 77(3). This case also laid down the two different facets which the council of Ministers bears, i.e. – i) the President exercises his powers on their aid and advise; and ii) the second is the individual Minister or all the Ministers of the Council with Prime Minister as the head discharge functions without any reference to the President. But there is no doubt that under Article 78 the Prime Minister is required to communicate all the decisions of the council of Ministers relating to the administration or reconsideration by Council of Ministers to the President if the President requires the Prime Minister to do so.¹¹ Thus in this case the Supreme Court emphasized on both the discretionary power of the President as well as the limitations on the discharge of the powers where the President cannot exercise his powers without the aid and advice of the Council of Ministers.

Further in *Bhuri Nath v. State of J&K*,¹² the Supreme Court held that “Unless President is required by the constitution to exercise power in his individual discretion, exercise of executive power, which is coextensive with legislative power, is with the aid advice of the Council of Ministers.”

So in the end it can be concluded that the executive powers of the centre are vested in the hands of the President but because of the various judicial pronouncements and the constitutional provisions mentioned above, the President is only a rubber stamp and the Council of Minister and the Prime Minister are the real head.

Legislative Powers: Legislative powers of the President are indicated by Article 79 which states that Parliament consist of the President and two houses. The President has power of summons and Prorogue (temporary suspension of the house) to both the house and also has right to dissolve the house of people [Art.85]. Such summons can also be served for the joint sitting of the houses in the cases of deadlock. He can even deliver the message to any of the house to which he thinks fit and essential of consideration or consultation whether it is the matter in respect the bills or otherwise [Art.86].

The law making powers, according to the doctrine of separation of powers, are vested in the Parliament. But when the Parliament or either of the Houses is not in session and there arises an urgent need to make the law then according to Article 123 of the Constitution the President can make laws and that is called as his ordinance making power. According to the provisions of the

¹⁰ (1993) 4 SCC 119.

¹¹ Ibid.

¹² (1997) 2 SCC 750.

Constitution the Ordinance can be issued only after the President's satisfaction. Further the power to promulgate the Ordinance is co-extensive with Parliament's power to make laws. Hence the President cannot issue any Ordinance which the Parliament cannot enact into the law. In *Krishna Kumar Singh v. State of Bihar*¹³, the Supreme Court held that the promulgation Ordinance under Article 123 is the Legislative power of the President and it shall have the same effect and the force as the law enacted by the Parliament. The Ordinance is promulgated in the name of the President but that is said to be promulgated on his satisfaction. Again the satisfaction of President here means the satisfaction of the Council of Ministers.¹⁴

The prior approval of the President is required when an action of alteration in the allocation of the consolidated funds of India, is to be performed or when modification in the bill is to be done and such modification is effecting the taxation of the States or in regard to money bill or when changes in the boundaries of the State which may include expansion of area; reduction of the area of that State or combining the boundaries of two State or more State or separating a State or States from one State [Art.265] and his assent to a bill results in its formation of the Statue.

Ordinance making power can be exercise only when the parliament is not in session or in situations of emergency or urgency and there is an immediate need of the legislation to be enacted to control the situation then at the request of the executive the President may pass an ordinance. And after the passing of ordinances when the Parliament comes back in session, then such ordinance will have to get the approval from both the houses to get enacted and take the form of permanent law as ordinance's power lasts only for six weeks from the date of its formation, so to make it prevail for long time it should be enacted [Art. 123].

Financial power- The President lays down the Annual Financial Statement (Budget); Supplementary Statement; the report of accounts of the Government of India submitted by the Auditor General of India; report of the recommendations given by the Finance Commission and Union Public Service Commission and actions taken thereon and further explaining the reasons for the non-acceptance of the recommendation given and lastly the report of the special officers for the STs/SCs/OBCs and linguistic minorities.

The President with regard to power in the financial issue of the Country , the Constitution provides that for all the money bills it is requisite to have the consent of the President to be initiated in the lower house of the Parliament.

The President has the power to return the bills presented to him for reconsideration or use his veto power but here Money bill is an exception to it as Money Bills cannot be returned for reconsideration. When it is returned, if both the houses again passes it then it would become obligatory for the President to pronounce his assent to it.

Judicial Powers - The Constitution of India under Article 72 provides one of the most important power to the President i.e. the Power of Pardoning which includes a group of allied powers with distinct legal importance that are: Pardon; Commutation; Reprieve; Respite; Remission and

¹³ (2017) 3 SCC 1.

¹⁴ Supra note 1.

Suspension. The President can exercise these powers only in cases as mentioned in the Constitution that are:

- Where the punishment or sentence is by the Court Martial;
- Where the punishment or sentence is for an offence in violation to any law relating to matter to which the executive power of the Union extends;
- In all cases where the sentence is a death sentence.

The ambit of this power does not exceed to the sentences of imprisonment or any other liability, not been yet decided by the Supreme Court to its contemnor.

The President exercises this power in the various matters on the advice of the Home Minister.

Although the Constitution provides the President an obligation to work upon the aid and advice of the Council of Ministers at Union Level, but the question which arises here is that whether such advice must mandatorily followed while acceptance/rejection of the petition of pardoning?

The textual and the judicial interpretation of the Constitution are absolutely different in proposition where the textual interpretation fails to convince that the framer of the Constitution intended for the advice of the council of ministers binding on the President.

The Supreme Court in *Samsher Singh v. Union of India*¹⁵ says that the satisfaction of the President which is required by the Constitution is not his personal discretion but has to be in compliance with the aid and advice of the Council of Ministers, was applied in the power of pardoning in case of the *Maru Ram v. Union of India*¹⁶ where the apex court held that it is not up to the President to make the decisions applying his own prudence and satisfaction of whether to pardon an individual or not but to decide on the satisfaction of the Council of Ministers.

Where the Supreme Court in the *Kehar Singh v. Union of India*¹⁷ that since the power of Pardon is of the widest amplitude, it is not open to the Judicial Review. In exercise of this power by the president is more prone to raise the situation of conflict between the Judiciary and the executive than that between the executive and the legislature as the power of President to grant/ deny the pardon may overlap to some degree with that of judiciary pronouncements.

The judiciary has been more reluctant to impose the guideline on the executive to exercise the power of Pardon. In *Kuljit Singh v. Lt. Governor of Delhi*¹⁸, the Judges expressed that the Pardoning power of the President is the wholesome power that is to be exercised “as the justice of the case may require” and undesirable to limit it by way of judicial-evolved constraints.

In *Kehar Singh Case*¹⁹, the power of President explained under the Article 72 was explained up to its widest scope, and was purported as function to remove the errors of the judiciary. But later validity of this pronouncement was stroked by Upendra Baxi who expressed that such view

¹⁵ Supra note 1.

¹⁶ (1981) 1 SCC 107.

¹⁷ (1989) 1 SCC 204.

¹⁸ (1982) 1 SCC 417.

¹⁹ Supra note 17.

would fetter the scope of power in a manner not contemplated in the Constitution. As our Constitution does not allowed the policy of death to traitors, insurgents, naxalites, dacoits and terrorist in the exercise of the discretion inherently provided in the clemency power where the logic of the doctrine of the reason of state is preserved in the basic structure of the constitution i.e. in the face of the Fundamental Rights.

In pardoning power the discretion is exercised in the light of the facts and circumstances of each case, though the issuing of guidelines will result in undesirable fettering in the grant or denial of pardon but there need to be exceptional instance where to warrant a procedure of review on this Presidential power insofar as the procedural impropriety or the right of individuals are concerned but should extend to the substantive merits of the decision made by the President.

The Supreme Court reiterated the extent of judicial scrutiny upon the power of pardon and boundaries of it to be exercised within by the executive in the case of *Narayan Dutt v. State of Punjab*²⁰. Where the Constitution mentions about the discretionary powers but nowhere in prevails as absolute in nature as to keep check on the rightful compliance of the rule of law which is requisite to be both necessary and desirable.

The above case to settle the disputed issue regarding the extent of the judicial review on the presidential power provided in the Article 72 of the Constitution. Court took the reference of the judgment pronounced by it in the case of *Maru Ram v. Union of India*²¹ i.e. the pardoning power of president is subjected to judicial reference on certain limited grounds.

In Landmark *Remission case*²², the Supreme Court adjudicated the critical exercise of powers and further in addition to it settled the grounds for the judicial scrutiny over the exercise of pardoning power i.e. Where the order is malafide as made by:

1. Non-application of mind
2. Extraneous or wholly irrelevant considerations;
3. Relevant materials being kept out of consideration;
4. Led by arbitrariness.

In addition to its judgment the court also realized that the granting pardon is not the one that overturns the conviction but then it is an executive action that mitigates or sets aside the punishment.

The President can seek the advisory opinion of the Supreme Court. Any question of law or matter of general or public importance in reference to which no case has knocked in front of the courts can be referred by him to the highest court.

There is a case that caught the eye of the public at large and left great influence as precedent in exercise of pardoning power is:

²⁰ (2011) 4 SCC 353.

²¹ Supra note 16.

²² (2006) 8 SCC 161.

In the case of *Mohammed Afzal Guru*²³:

One of the mercy petitions, which was very much highlighted in news and noticed by the public, was that of Afzal Guru, the person who convicted and sentenced to be hanged till death for the offence of being the compliance to the Parliament Attack case. He was been kept in the death row for more than three to four year caused due to delay made by the Government in hearing his petition as there were high chances he been attaining the title of Martyr but such inaction led to the revolt by the public which pleased the government to take serious action against the terrorist.

It settled that regardless of the manner in which the pardoning power has developed over a period of time, but the political assistance plays the primary role granting and rejecting the mercy petition. In this case the President was in obligation act in proactive manner such that the prerogative of pardon not to be affected by the political influences present in society. Although the Constitution provides the President to base his opinion in decision on the aid and advice of the Council of Ministers and not to deviate from it but if the Council of Ministers causes unreasonable delay in coming to the conclusion, then the President should make prudent use of his power and dispose of such petition in a expeditious manner. The indefinite deferral of the decision of merci petition is capable to caste such constitutional power in bad light and further the Merci Petition in this case was rejected and ordered the directions for the execution of death sentence of Mohammed Afzal Guru.

Foreign and military power - The Constitution vests the power of Supreme Commander of the defense forces in the President. He makes all the appointment in the defense forces. He holds the power to declare war against any country in accordance to the situations and conclude peace. The executive power related to the foreign and diplomatic affairs is conducted in the name of the President. Under the Constitution he required to do so under the control, guidance and authority of the Parliament.

Emergency power - The President of India performs the special role in the enforcement of the emergencies in the country as he is been empowered under the Article 352-360 in the Constitution to proclaim the implementation or initiation of the emergency period in the whole of the country or in any part of the country.

According to the Indian Constitution the Emergency powers of the President are of three types:

1. **National Emergency:** The President under the Article 352 may proclaim the emergency at any time when he is satisfied that the security of whole of India or any part of it is threatened by war, external aggression or armed rebellion. This announcement can be made even prior to such eventuality take place not only after the occurrence. It is not necessary that external aggression must be actual, potential threat or anticipation of danger is adequate. And accordingly as the after effect of such proclamation will be that the Indian polity will work as a unitary system and the President as well as the Parliament will take the necessary action with the motive to protect whole or that part of India. According to Article 352(3) the

²³ 2003 SCC OnLine Del 1935.

President cannot issue a Proclamation under Clause (1) of Article 352 unless the decision of council of ministers headed by the Prime Minister that the proclamation which is going to be issued has been communicated to him in writing. So according to this provision it is clear that even in the case of emergency powers, the president cannot use his powers with full discretion. In all the National emergencies which the President has proclaimed till now, has only been proclaimed after receiving the aid and advice of the council of Minister.

2. **State Emergency:** This type of emergency is defined well in the Article 356 and is popularly known as the Presidential Rule in the State. It is not absolutely an emergency but the breakdown in the Constitutional machinery of the State and proclaimed by the President on the report of the Governor of that State. As the later consequence the President is titled as the head of that State and takes over the power and functions of the governor of that State and the Parliament becomes the law making body. But the emergency power mentioned under Article 356 is not the power which the President can discharge on his own discretion. For the proclamation of the State Emergency the President's satisfaction is important and according to the constitution and the judicial pronouncements the satisfaction of the President means the aid and advice of the Council of Ministers. In *S.R. Bommmai v. Union of India*²⁴ the Supreme Court stated that the Clause (1) of Article 123 provides that "if the President is satisfied". Jeevan Reddy and Agrawal JJ, stated that "these words are indicative of the satisfaction being a subjective one. Since it is a case of subjective satisfaction, question of observing the principles of natural justice does not and cannot arise.... It is evident that the satisfaction has to be formed by the President fairly, on a consideration of the report of the Governor and/or other material, if any, placed before him. Of course the president under our Constitution being, what may be called, a constitutional President obliged to act upon the aid and advice of the Council of Ministers..... The satisfaction referred to in Article 356(1) really means the satisfaction of the Union Council of Ministers with the Prime Minister at its head."²⁵

3. **Financial Emergency:** This situation comes when the President of India is satisfied that financial stability of the country or any part of it is seriously affected he can announce the financial emergency. This power is defined under Article 360 of the Constitution. The effect of such proclamation remains for two month. After such proclamation:

- The President may direct the State Government to observe the economic measures of public expenses;
- All the money bills are reserved for the reconsideration of the President;
- The money grant and allowance of the government servants and other High Dignitaries can be reduced as measure to overcome such situations;
- The President also reconsiders the allocation of the revenue while acting on the recommendations of the Finance Commission.

²⁴ Supra note 3.

²⁵ Supra note 3.

This article also starts with the word “if the President is satisfied”, so according to the judicial pronouncements made in the case laws, namely *Shamsher Singh v. Union of India*²⁶, *S.R. Bommai v. Union of India*²⁷ – the satisfaction of the President means the satisfaction of the Council of Ministers and their aid and advice to the President after satisfaction.

All these above mentioned points related to different Constitutional provisions and the judicial pronouncements shows that the present condition of the President is just like a rubber stamp, who has to discharge his powers in accordance to the aid and advice of the council of ministers. The landmark cases referred here has limited the scope of discharge of Presidential power with his own discretion and has made the Council of Ministers headed by the Prime Minister the real head, and this system is somehow similar to the administrative machinery of United Kingdom. The only difference is they are having the hereditary monarch and in India it is the democratic head elected by the people.

²⁶ Supra note 1.

²⁷ Supra note 3.